# UMW Industries Sdn Bhd v Ah Fook

FEDERAL COURT (KUALA LUMPUR) — CIVIL APPEAL NO 03-36-1994
CHONG SIEW FAI CJ (SABAH & SARAWAK), PEH SWEE CHIN FCJ, SHAIK DAUD JCA
8 DECEMBER 1995

***Hire-purchase*** *— Breach of agreement — Failure to pay instalments — Finance company assigned right and interest in hire-purchase agreement to third party — Third party gave notice of assignment to guarantor and hirer two years after deed of assignment was executed — Finance company sued hirer and guarantor for arrears — Whether assignment an equitable chose in action — Whether failure to give notice of assignment within reasonable time fatal — Civil Law Act 1956 s 4(3)*

***Civil Law Act*** *— Assignment — Conditions for effecting absolute legal assignments — Whether assignee should give notice of assignment within reasonable period of time — Civil Law Act 1956 s 4(3)*

By a hire-purchase agreement ('the agreement'), the Malayan Finance Corp Bhd ('the finance company') let to Sin Yew Lee Mining Sdn Bhd ('the hirer'), on hire-purchase, a hydraulic excavator for the price of RM179,250. By a letter of guarantee, the respondent guaranteed the observance of all terms and conditions by the hirer contained in the agreement. The hirer later defaulted, and the hydraulic excavator was repossessed. The value of the excavator was assessed to be RM58,000. By a deed of assignment dated 18 January 1983 ('the deed of assignment'), the finance company assigned to the assignee ('the appellant') all the former's benefit, right, title and interest in the agreement. The notice of assignment, however, was not given to the respondent till 12 April 1985, ie more than two years and two months after the deed of assignment was executed. By a letter dated 12 April 1985, the appellant demanded payment of the balance of the outstanding instalments from the respondent. Failing to obtain the payment, the appellant on 21 September 1985 began an action against the hirer and the respondent as the first and the second defendants respectively. Judgment in default of appearance was later entered against the respondent. The respondent sought to set aside the default judgment but was refused by the senior assistant registrar. On appeal, the High Court set aside the default judgment, solely on issues relating to assignment. The judge regarded the assignment 'an equitable chose in action', and as such, considered that notice of assignment must be given within a reasonable time, and regarded the time lapse of two years in this case as unreasonable. The appellant appealed.

**Held**, allowing the appeal:

(1) The judge had confused between statutory and equitable assignments. After erroneously regarded the assignment in question as an equitable assignment, she applied the statutory requirement of giving notice (see p 370E–I).

(2) Pursuant to s 4(3) of the Civil Law Act 1956 ('the Act'), the conditions for effecting absolute legal assignments are: (i) that the assignment must be in writing under the hand of the assignor; (ii) that the assignment must be absolute and not by way of charge only; and (iii) that express notice in writing must have been given to the person liable to the assignor. If all the conditions are fulfilled, the assignment would transfer absolutely the chose in action and the right to sue upon it in the assignee's own name (see p 371A–B).

(3) On the facts of the case, the deed of assignment was absolute, and came within s 4(3) of the Act. Conditions (i) and (ii) above were fulfilled, as there was evidence that the deed of assignment was signed by a proper officer on behalf of the assignor. The respondent's complaint that the notice was given more than two years after the execution of the deed of assignment was not valid, as neither s 4(3) of the Act nor any law has prescribed any limit of time within which notice must be given to the debtor, trustee or other person from whom the assignor would have been entitled to claim the debt. However, notice must be given before the assignee takes out its writ. In this case, notice was given before the action was commenced (see p 371E–I) *Compania Colombiana de Seguros v Pacific Steam Navigation Co* [1965] 1 QB 101 followed.

(4) Although the assignee gave the respondent the notice of assignment late, there was no evidence of any equity having come into existence prior to the giving of the notice, such that the right of the assignee was adversely affected (see p 372E).

**Obiter:**

(1) Failure to give notice before an assignee takes out his writ will not prevent the assignee from proceeding with his action on the basis that he is an equitable assignee (see p 371I)

(2) Notice to the debtor or guarantor is not an essential requirement to constitute equitable assignment (see p 372G); *Gorringe v Irewell India Rubber And Gutta Percha Works* (1886) 34 Ch D 128; *Re City Life Assurance Co (Stephenson's Case)* [1926] Ch 191; *Re Patrick, Bills v Tatham* [1891] 1 Ch 82.

**[Bahasa Malaysia summary**

Melalui suatu perjanjian sewa beli ('perjanjian tersebut'), Malayan Finance Corp Bhd ('syarikat kewangan tersebut') menyewa kepada Sin Yew Lee Mining Sdn Bhd ('pentewa tersebut'), atas sewa beli, sebuah mesin penggorek hidrolik untuk jumlah RM179,250. Melalui suatu surat gerenti, penentang menggerenti pematuhan kesemua terma dan syarat yang terkandung dalam perjanjian tersebut oleh penyewa. Penyewa kemudiannya ingkar, dan mesin penggorek hidrolik

tersebut telah dimiliki semula oleh syarikat kewangan tersebut. Nilai penggorek tersebut telah ditaksirkan sebanyak RM58,000. Melalui suatu suratikatan penyerahhakan bertarikh 18 Januari 1983 ('suratikatan penyerahhakan tersebut'), syarikat kewangan tersebut menyerahhak kepada pemegang serahhak ('perayu') kesemua manfaat, hak, hakmilik, dan kepentingan yang dimiliki oleh syarikat kewangan tersebut dalam perjanjian tersebut. Walau bagaimanapun, notis suratikatan penyerahhakan tidak diberikan kepada penentang sehingga 12 April 1985, iaitu lebih daripada dua tahun dan dua bulan selepas suratikatan penyerahhakan tersebut disempurnakan. Melalui sepucuk surat bertarikh 12 April 1985, perayu menuntut bayaran baki ansuran yang belum dibayar daripada penentang. Gagal untuk mendapatkan bayaran itu, perayu telah pada 21 September 1985 memulakan suatu tindakan terhadap penyewa dan penentang sebagai defendan pertama dan kedua masing-masing. Penghakiman ingkar kehadiran kemudiannya telah dimasukkan terhadap penentang. Penentang memohon untuk mengenepikan penghakiman ingkar tersebut tetapi ia telah ditolak oleh penolong kanan pendaftar. Selepas rayuan dibuat, Mahkamah Tinggi mengenepikan penghakiman ingkar tersebut, semata-mata atas isu yang berkenaan dengan penyerahhakan. Hakim menganggap penyerahhakan tersebut ialah 'suatu hak dalam tindakan ekuiti', and oleh itu, berpendapat bahawa notis penyerahhakan harus diberikan dalam tempoh masa yang munasabah, dan menganggap peluputan masa selama dua tahun dalam kes ini sebagai tidak munasabah. Perayu merayu.

**Diputuskan,** membenarkan rayun itu:

(1) Hakim telah keliru antara penyerahhakan statutori and ekuiti. Selepas silap menganggap penyerahhakan yang berkenaan adalah suatu penyerahhakan ekuiti, beliau telah memakai keperluan statutori untuk memberi notis (lihat ms 370E–I).

(2) Menurut s 4(3) of Akta Undang-Undang Sivil 1956 ('Akta tersebut'), syarat untuk melaksanakan penyerahhakan undang-undang yang mutlak ialah: (i) penyerahhakan tersebut harus dibuat secara bertulis dan ditandatangani oleh penyerahhak; (ii) penyerahhakan harus mutlak dan bukan secara gadaian sahaja; dan (iii) notis nyata yang bertulis harus diberikan kepada orang yang bertanggungan kepada penyerahhak. Jika kesemua syarat dipenuhi, penyerahhakan tersebut akan memindahmilik secara mutlak hak dalam tindakan dan hak untuk mendakwa atasnya dalam nama pemegang serahhak (lihat ms 371A–B).

(3) Atas fakta kes, suratikatan penyerahhakan adalah mutlak, dan adalah dirangkumi oleh s 4(3) Akta tersebut. Syarat (i) dan (ii) di atas telah dipenuhi kerana terdapat keterangan bahawa suratikatan penyerahhakan telah ditandatangani oleh pegawai yang wajar bagi pihak penyerahhak. Rugutan penentang bahawa

notis telah diberikan lebih daripada dua tahun selepas penyempurnaan suratikatan penyerahhakan adalah tak sah, kerana sama ada s 4(3) Akta tersebut atau sebarang undang-undang juga tidak menetapkan apa-apa had masa di mana notis harus diberikan kepada penghutang, pemegang amanah atau orang lain yang penyerahhak berhak menuntut hutangnya. Walau bagaimanapun, notis harus diberikan sebelum pemegang serahhak memulakan tindakan secara writ. Dalam kes ini, notis telah diberikan sebelum tindakan bermula (lihat ms 371E–I); *Compania Colombiana de Seguros v Pacific Steam Navigation Co* [1965] 1 QB 101 diikut.

(4) Walaupun pemegang serahhak lewat dalam memberikan notis penyerahhakan kepada penentang, tidak terdapat keterangan bahawa sebarang ekuiti telah wujud sebelum notis diberi hinggakan hak pemegang serahhak terganggu (lihat ms 372E).

**Obiter:**

(1) Kegagalan untuk memberi notis sebelum pemegang serahhak memulakan tindakannya secara writ tidak akan menghalang pemegang serahhak daripada meneruskan tindakannya atas dasar bahawa ia adalah seorang pemegang serahhak ekuiti (lihat ms 371I).

(2) Notis kepada penghutang atau penggerenti bukan merupakan suatu keperluan yang penting untuk menjadi penyerahhakan ekuiti (lihat ms 372G); *Gorringe v Irewell India Rubber And Gutta Percha Works* (1886) 34 Ch D 128; *Re City Life Assurance Co (Stephenson's Case)* [1926] Ch 191; *Re Patrick, Bills v Tatham* [1891] 1 Ch 82).

**Notes**

For cases on assignments, see 1 *Mallal's Digest* (4th Ed, 1995 Reissue) paras 2189–2194.

For cases on breach of hire-purchase agreements, see 7 *Mallal's Digest* (4th Ed, 1995 Reissue) paras 2300–2322.

**Cases referred to**

*Bateman v Hunt* [1904] 2 KB 530

*City Life Assurance Co (Stephenson's Case), Re* [1926] Ch 191

*Compania Colombiana de Seguros v Pacific Steam Navigation Co* [1965] 1 QB 101

*Curran v Newpark Cinemas Ltd* [1951] 1 All ER 295

*Gorringe v Irewell India Rubber And Gutta Percha Works* (1886) 34 Ch D 128

*Lord Southampton's Estate, Allen v Lord Southampton, Banfather's Claim* (1880) 16 Ch D 178

*Marchant v Morton, Down & Co* [1901] 2 KB 829

*Patrick, Bills v Tatham, Re* [1891] 1 Ch 82

*Spellman v Spellman* [1961] 2 All ER 498

*Stocks v Dobson* (1853) 4 De GM & G 11

A *Westerton, Public Trustee v Gray, Re* [1919] 2 Ch 104

**Legislation referred to**

Civil Law Act 1956 s 4(3)
Law of Property Act 1925 s 136(1) [UK]

B

**Appeal from:** Civil Suit No C5790-1985 (High Court, Kuala Lumpur)

*P Pereira (Skrine & Co)* for the appellant.
*Vidhya Iyer (Lim Seong Chun & Co)* for the respondent.

C

**Chong Siew Fai CJ** (delivering the judgment of the court): The appellant/plaintiff ('the assignee') appeals against the decision of the judge in chambers who overruled the senior assistant registrar, and set aside the judgment in default of appearance obtained by the assignee against the respondent/
D second defendant ('the guarantor') with costs.

The relevant facts of the case may be summarized as follows:

By a hire-purchase agreement dated 15 March 1982, the Malayan Finance Corp Bhd ('the finance company') let to one Sin Yew Lee Mining Sdn Bhd ('the hirer'), on hire-purchase, a hydraulic excavator for the price
E of RM179,250 payable as follows:

(a) RM37,500 as deposit;

(b) the balance thereof by monthly instalments of RM5,906.25 each commencing on 15 April 1982, and thereafter on the 15th day of
F each succeeding month.

By a letter of guarantee dated 15 March 1982, the guarantor guaranteed the due payment of all sums and the due performance and observance of all terms and conditions by the hirer contained in the hire-purchase agreement, and also undertook to indemnify the finance company against
G all loss or damage that might be sustained by the finance company under the hire-purchase agreement.

In breach of the hire-purchase agreement, the hirer fell into arrears of payment of the monthly instalments. The hydraulic excavator was repossessed on 11 November 1982, and the value thereof was assessed by
H a licensed adjuster to be RM58,000.

By a deed of assignment dated 18 January 1983, the finance company assigned to the assignee all the former's benefit, right, title and interest in the hire-purchase agreement. The relevant clause of the deed reads:

> The assignor hereby assigns unto the assignee *all* the benefit right title and
I interest of the assignor in or under the said agreement of the 15 March 1982 together with the right so far as may be necessary to demand performance of sue for and enforce the same in the name of the assignee *to hold* the same unto the assignee absolutely.

We would add here, and it was never disputed before us, that benefits and rights of hire-purchase agreements are choses in action, assignment of which are recognized in law as illustrated in *Spellman v Spellman* [1961] 2 All ER 498 CA.

The notice of assignment, however, was not given to the guarantor till 12 April 1985 ie, more than two years and two months after the deed of assignment was executed, but be it noted, before the commencement of the action now under appeal.

By a letter dated 12 April 1985, the assignee demanded payment by the guarantor a sum of RM53,326 being the amount made up of the balance of the outstanding instalments (less statutory rebate) plus costs of and incidental to the repossession of the excavator minus the value thereof. Failing to obtain payment as demanded, the assignee on 21 September 1985 began the action presently under appeal against the hirer and the guarantor as the first and the second defendants respectively. The guarantor was duly served by substituted service but failed to enter appearance. Judgment in default was accordingly entered against him on 30 September 1986 for the sum claimed, interest, and costs.

The guarantor sought to set aside the default judgment but was refused by the senior assistant registrar. On appeal, the learned judge, as stated at the commencement of this judgment, set aside the default judgment. Hence this appeal by the assignee.

In setting aside the default judgment, the decision of the learned judge rested solely on issues relating to assignment. She regarded (in our opinion, erroneously) the assignment 'an equitable chose in action', and as such, considered that notice of assignment must be given within a reasonable time, and that 'a time lapse of two years can hardly be described as being reasonable'. She continued:

> It is true that cl 3(6) of the guarantee contemplates the assignment of the rights of the first defendant under the hire-purchase agreement and the second defendant's liability to meet payment upon the default of the first defendant is in no way discharged by reason of such an assignment. However, the provisions of that clause did not take away the statutory requirement that the second defendant must be served with a written notice of the assignment within a reasonable time. As this only took place two years after the assignment was executed and three years after the hire-purchase agreement had been terminated, I consider that the inordinate delay does provide the second defendant with a defence.

It appears to us from the above that the learned judge had also confused between statutory and equitable assignments. Having regarded the assignment to be an equitable assignment, she applied the statutory requirement of giving notice. Her other reason for setting aside the default judgment was that the giving of notice of assignment two years after the creation of the assignment constituted sufficient merits.

We have considered s 4(3) of the Civil Law Act 1956 referred to by counsel for both sides. The subsection lays down conditions for effecting absolute legal assignments. It is clear that the conditions are:

A (1) that the assignment must be in writing under the hand of the assignor;

(2) that the assignment must be absolute and not by way of charge only; and

(3) that express notice in writing must have been given to the person liable to the assignor under the assigned chose in action.

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If the assignment fulfills all the above conditions, it would transfer absolutely the chose in action and the right to sue upon it in the assignee's own name.

As to the assignment in writing, no particular form is necessary but it must be absolute, ie one that purports to pass the entire interest of the C assignor in the chose in action. Thus in *Curran v Newpark Cinemas Ltd* [1951] 1 All ER 295 (CA), Jenkins LJ dealing with s 136(1) of the Law of Property Act 1925 (English) the equivalent of which in our law is s 4(3) of the Civil Law Act 1956, said: (at p 299 F–H)

> D It is, no doubt, true that s 136(1) does not require any particular form of assignment, or that the notice given to the debtor should necessarily have been given by the assignee. The subsection does, however, clearly postulate that, whatever its form, there should be a document amounting to an absolute assignment by writing under the hand of the assignor. Given such an assignment, and given the requisite notice to the debtor, the assignment (to put it shortly) is to operate as a legal assignment of the debt in question.

E Looking at the deed of assignment dated 18 January 1983, we are convinced that the document, from the point of the wording or language therein used, is capable of constituting a valid assignment under s 4(3) of the Civil Law Act 1956. There is evidence that the deed dated 18 January 1983 was signed by a proper officer on behalf of the assignor, or at least there is no F dispute or challenge to that. Thus conditions (1) and (2) above are fulfilled.

This brings us to the question of the notice to the guarantor. As indicated earlier, the complaint of the guarantor was that the notice was given more than two years after the execution of the deed of assignment.

G Section 4(3) of the Civil Law Act 1956 does not, and, for that matter, there is, as we understand, no law prescribing any limit of time within which notice must be given to the debtor, trustee or other person from whom the assignor would have been entitled to claim the debt or chose in action, eg a guarantor. All that the said s 4(3) requires is that H 'express notice in writing' be given. Hence, notice may be given after the death of the assignor (*Re Westerton, Public Trustee v Gray* [1919] 2 Ch 104), or after the death of the assignee (*Bateman v Hunt* [1904] 2 KB 530 (CA)). Notice, however, must be given before the assignee takes out its writ (*Compania Colombiana de Seguros v Pacific Steam Navigation Co* [1965] 1 QB 101 at pp 127–129); but even then, failure to do so will not prevent I the assignee from proceeding with its action on the basis that it is an equitable assignee in which case the court may require the assignor to be made a party to the proceedings. In our case presently under appeal, notice was given before the action was commenced.

On the facts circumstances of the case, and, with respect, in contrast to the view of the learned judge, we find that the assignment dated 18 January 1983 is absolute, and comes within s 4(3) of the Civil Law Act 1956.

There remains the question whether the late notice of assignment given by the assignee has in any way affected the rights of the assignee to remedies against the guarantor. Express notice in writing under the said s 4(3) is required to be given so as: (i) a legal title to the property assigned may be acquired; (ii) to establish the priority of competing assignments, if any (see eg *Marchant v Morton, Down & Co* [1901] 2 KB 829); and (iii) to prevent the debtor or guarantor in our present case paying and thereby getting a good discharge for the payment from his original creditor. It must be noted that payment to the creditor will be a good satisfaction of the debt or claim, notwithstanding it may have been assigned, if the debtor or guarantor has no notice of the assignment (*Stocks v Dobson* (1853) 4 De GM & G 11; *Lord Southampton's Estate, Allen v Lord Southampton, Banfather's Claim* (1880) 16 Ch D 178).

In the instant case under appeal, there is no evidence nor, indeed, was it raised that there was any assignment other than that to the assignee, ie the appellant.

Although the assignee gave the guarantor the notice of assignment late, there is no evidence of any equity having come into existence prior to the giving of the notice, such that the right of the assignee under the deed of assignment is thereby adversely affected.

We therefore hold, on the evidence and the facts before us, that the appellant succeeds in its contention that it had obtained a statutory absolute assignment of all the benefits rights titles and interests of the assignor in or under the hire-purchase agreement dated 15 March 1982 effective on the date of receipt by the guarantor of the notice of assignment dated 12 April 1985 free from all equities and adverse claims.

The learned judge appears to consider that notice to the guarantor is an essential requirement to constitute equitable assignment. With respect, inasmuch as concerning the validity of an equitable assignment (which the present assignment under appeal is not), notice to the debtor or guarantor is not necessary. In other words, an assignment may be perfectly valid without such a notice (*Gorringe v Irewell India Rubber And Gutta Percha Works* (1886) 34 Ch D 128; *Re City Life Assurance Co (Stephenson's Case)* [1926] Ch 191 at pp 214, 219–220; *Patrick, Bills v Tatham, Re* [1891] 1 Ch 82 at p 87). But it is desirable that such notice be given, because until the debtor or guarantor receives the notice, the debtor or guarantor, as the case may be, is entitled to pay to the original creditor. Also, the giving of such notice may discourage further equities attaching to the debt or claim being created, and may affect priorities of competing assignments (see *Chitty on Contracts, General Principles* (24th Ed) paras 1160, 1184.

There remains the points on valuation of the excavator and the sum claimed in the action which the learned judge mentioned in her judgment

A but with which she did not deal. Before us neither of the parties had raised them, which we accordingly take to have been abandoned.

For the above reasons, we allow the appeal. The order of the learned judge made on 28 February 1994 is hereby set aside. The judgment dated 30 September 1986 be and is hereby restored. The appellant/assignee shall B have the costs of the appeals here and below; in the absence of an agreement, such costs be taxed.

*Appeal allowed.*

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Reported by Isabel Liong

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